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In The Supreme Court of The United States

October Term, 1963

JOHN WILLIAM WHALEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY
In Propria Persona
2420 University Avenue
San Diego, California

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 12, 1963.

CITATIONS TO OPINIONS BELOW

The District Court in and for the Southern District of California rendered judgment against Petitioner, namely,

> "Three (3) years, and execution of sentence is suspended and the defendant is placed on probation for a period of five years on condition, that he obey all laws, Federal State or Municipal, and that he comply with all lawful rules and regulations of the Probation Officer of this Court, and that he does not engage in the business or employment, in any way, of the work of private investigator or detective and that he not use in his business or employment the term 'National Bureau of Investigation' or any other name similar to that of 'Federal Bureau of Investigation', and that he does not repossess automobiles or engage in any other similar business except with the approval of the Probation Officer of this Court."

and entered on September 27, 1962, and attached hereto and marked as "Appendix A". The United States Court of Appeals affirmed said judgment on November 12, 1963, a copy of which is attached hereto and marked "Appendix B".

JURISDICTION OF THE COURT AND STATUTES INVOLVED

Petitioner was convicted of falsely impersonating a member of the Federal Bureau of Investigation, namely, Section 912 of Title 18, United States Code. An appeal therefrom was had to the United States Court of Appeals for the Ninth Circuit. Petitioner now petitions the Supreme Court of the United States under and in pursuance to Rules 22 and 23 of the Supreme Court Rules, and 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

Whether the evidence was sufficient to sustain the conviction. Whether the instructions as given by the District Court to the jury were clear and unambiguous so that an ordinary and prudent person could understand them. Whether the evidence of the prior acts that were introduced were remote, prejudicial or inconsistent, and immaterial to the issues.

STATUTE INVOLVED

Section 912 of Title 18, United States Code.

STATEMENT

Petitioner was employed by a corporation known as the National Bureau of Investigation, which company name had been used for the past 27 years and which was registered in the County of Los Angeles, State of California, (Reporter's Transcript - R. T. p. 164, lines 11 to 25). He was employed by said corporation for a period of seven to ten years (R. T. p. 170, lines 1 to 5).

That the employees of said corporation, including the petitioner, used an identification card, Government Exhibit No. 1, since 1935 (R. T. p. 166, lines 19 to 22). Also, said employees were compelled to carry a badge bearing the name National Bureau of Investigation (R. T. p. 167, lines 11 to 17).

On or about March 13, 1962, petitioner contacted Mr. and Mrs. Reedy (prosecution witness), to ascertain the whereabouts of Mrs. Reedy's father. Petitioner purportedly showed Mr. Reedy an identification card, bearing the name Federal Bureau of Investigation. That petitioner at no time represented orally that he was from the Federal Bureau of Investigation (R. T. p. 73, lines 16-17). The evidence is insufficient to sustain the verdict in the instant case. The only witness from whom the only bit of testimony that the prosecution presented was Mr. Reedy, who stated that he saw petitioner's identification card, bearing the words Federal Bureau of Investigation. Petitioner was dressed in a sport outfit (R. T. p. 6, lines 1 to 2); he was wearing a sport shirt (R. T. p. 77, lines 1 to 2), and was driving a 1961 Oldsmobile F-85 compact automobile (R. T. p. 176, lines 13 to 14; p. 71, lines 11 to 13).

Further, both Mr. and Mrs. Reedy stated that petitioner was present because of repossessing their father-in-law's vehicle (R. T. p. 6, lines 17 to 20), and further, there was discussion concerning the past attempts to repossess their father-in-law's car for non-payment. (R. T. p. 79, lines 19 to 25; p. 83, lines 11 to 14; p. 84, lines 14 to 21; p. 25, lines 1 to 10). Petitioner did not exhibit a gun (R. T. p. 17, lines 1 to 2), nor was there any threat of prosecution (R. T. p. 26, lines 15 through 18; p. 27, lines 23 to 25, and p. 28, lines 1 through 11).

The Reedys then stated that they relied on the impression that petitioner was a member of the F.B.I. and thus gave him this information. This is contradicted not only by petitioner's testimony, but also by the fact that he was invited into the residence before any representations were made (R. T. p. 72, lines 24 to 25; p. 73, lines 1 to 3), and yet the Reedys would not give their father's telephone number to petitioner. (R. T. p. 86, lines 22 to 24).

The main substantial fact, namely, the identification card, was never even inquired into by the special agent for the Federal Bureau of Investigation (R. T. p. 67).

The factor of identification card was substantially controverted not only by the prosecution's evidence, but also by petitioner's evidence, an example of which can be found to the stipulation of the identification card (R. T. p. 10, lines 9 to 23).

Upon petitioner's leaving the premises, Mr. Reedy explained that Mr. Whaley was from the Federal Bureau of Investigation, whereupon Mr. Whaley left the residence. This was the entire premise for said conviction.

Two additional cases were brought in for the purpose of showing intention, which matters were objected to on the basis of irrelevancy, immateriality and remoteness, and which objections were overruled. The first instance took place approximately August 30, 1961, wherein petitioner repossessed a boat from a Mr. Gonzales, and the only testimony here was that at one point the petitioner told the witness he was from the Federal Bureau of Investigation. The boat had already been

repossessed. This witness knew they were repossessing same (R. T. p. 109, lines 13 to 24). There was no reliance hereon, and this testimony was controverted, not only by the defense, but by defense witnesses Eugene B. Swartwood (R. T. p. 184, lines 19 to 21) and by a witness Carl Rosenthal.

Another incident was introduced by a prosecution witness, Mr. Haleen A. Williams, stating that petitioner had represented to him that he was from the National City Police Department. This again was re repossessing a car, the witness knew the car was being repossessed. This again was controverted by a defense witness Swartwood and Mr. Andrew Nossal, who is now a member of the Sheriff's Department of San Diego County. At this instance, the San Diego Police Department was called. No arrests were made. That apparently it was felt by the San Diego Police Department that Mr. Williams was not telling the truth.

Further, the petitioner and Eugene Swartwood testified that they never had a card bearing the words Federal Bureau of Investigation (R. T. p. 183, lines 7 to 11).

In addition, two witnesses were introduced as character witnesses on behalf of the petitioner, Mr. James R. Clifton, an employee of the First National Trust and Savings Bank, and Reilly P. Stearns.

In the light of all this evidence, it is the contention of petitioner that this evidence was insufficient to warrant a conviction. The motion for dismissal was made to the court after the prosecution's evidence was introduced, which motion was taken under submission by the Court, and never decided until all the evidence was

introduced, at which time the Court then denied the motion.

REASONS FOR GRANTING THE WRIT

The Court allowed introduction of prior acts, one of which involved the alleged fact that a Mr. Haleen A. Williams was informed by Petitioner that he (petitioner) was from the National City Police Department. It is contended that this would have nothing to do with the issue at hand. Further, Mr. Williams is an unsavory character, who, since said trial has been indicted for counterfeiting. It is petitioner's contention that the Government should be bound by the type of witness they introduce, in that Mr. Haleen A. Williams was, in fact, perjuring himself for the purpose of instituting a civil suit against petitioner.

The Court had instructed the jury as follows:

At Reporter's Transcript, page 246, lines 16 through 20, the Court states:

> "A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or disregard the law, may be found to act with specific criminal intent."

Compared to Reporter's Transcript, page 247, lines 15 through 19,

"So good motive alone is never a defense where the act done or omitted is a crime. Motive of the accused is immaterial indeed except insofar as evidence of motive may aid determination of intent or state of mind."

The Court, on the one hand, discussed "intent", and on the other hand discusses the question of "motive". It is also conceded that motive is generally speaking immaterial in a criminal case; however, according to the instructions at Reporter's Transcript, page 246, the court distinctly implies intention and motive to be one and the same thing, and with this, petitioner cannot agree.

The court further instructed the jury at Reporter's Transcript, page 251, lines 10 to 24:

"The statute is aimed against false pretense of any office or employment under the United States. Thus it is of no consequence whether the pretender names an existing or a non-existing office or officer, or fails to name, describe or designate accurately the pretended office or employment.

The statute is intended not only to protect innocent persons from actual loss through reliance upon false assumptions of Federal Authority, but also to maintain the good repute and dignity of the Federal Service itself.

It is no defense to assert that a reasonable person should not have been deceived by

> the false pretense. The object of the statute is to safeguard the respect due the authority of Federal officers from the most gullible as well as the least credulous." (Emphasis added.)

inferring that a person can be convicted of this crime whether or not he does make a representation or fails to make a representation - that the important thing is the reliance one places upon a set of circumstances, whether reasonably or unreasonably.

It is contended that this instruction is ambiguous and is "catch as catch can". This is certainly not the law. There are many instructions, where persons may arrive at impressions and conclusions, and would not have the right or the privilege to do so. In the instant case, the petitioner certainly had no duty to inform the prosecution witness Reedy in the light of all the circumstances that he was not from the Federal Bureau of Investigation. Federal Detective Bureau Inc. vs. U.S., 77 S.Ct. 1296, 354 U.S. 909.

Also, according to the instructions, the court in effect made the jury partisans rather than judges. When the court instructed the jury that the respect of the federal services was to be maintained, it in effect inferred that if the jury were to acquit the petitioner, that the good name of the Federal Bureau of Investigation would not be maintained. Such may be the object of the law. However, it is the contention of petitioner that such object should not have been put in the instructions, and was not the function of a jury to consider.

The next instruction which the court gave, and to

which petitioner objects, was Reporter's Transcript, page 243, lines 16 through 20:

> "Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence." (Emphasis added.)

The only one who could possibly be affected by the verdict would be petitioner, and it is contended that such statement informs that the defendant would be more prone to telling non-truth, and that this would be extremely prejudicial to his case.

Thereafter, the jury, during its deliberation, requested of the Court to define "falsely pretending", which was the CRUX of this case. The Court then instructed the jury by way of example, which can be seen at Reporter's Transcript, page 260, lines 10 through 25; page 261, page 262, page 263 and page 264.

In this instruction, and by way of example, a court in effect stated that a person could be convicted of the herein crime, regardless of any duty that he may have cast upon his shoulders, even though the assumption made by the alleged innocent party was unwarranted. The jury seemed satisfied with this instruction. Thereafter, defense counsel informed the court as to the unreasonableness of his instructions, and the court then recalled the jury and attempted to clear this by a subsequent instruction given (R. T. p. 265 to p. 267). It is contended by the petitioner that such manner of giving instruction was erroneous and extremely prejudicial to

the petitioner, and was so ambiguous that it cannot be seen by petitioner how the jury had any basis on which to arrive at a conclusion.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN WILLIAM WHALEY,

In Propria Persona

APPENDIX A

"Three (3) years, and execution of sentence is suspended and the defendant is placed on probation for a period of five years on condition that he obey all laws, Federal, State or Municipal, and that he comply with all lawful rules and regulations of the Probation Officer of this Court, and that he does not engage in the business or employment, in any way, of the work of private investigator or detective and that he not use in his business or employment the term 'National Bureau of Investigation' or any other name similar to that of 'Federal Bureau of Investigation', and that he does not repossess automobiles or engage in any other similar business except with the approval of the Probation Officer of this Court."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 18,678

Nov. 12, 1963

Appeal from the United States District Court for the Southern District of California
Southern Division

Before: JERTBERG and KOELSCH, Circuit Judges, and BOWEN, District Judge

BOWEN, District Judge:

Appellant John William Whaley was engaged in repossessing for the seller or mortgagee automobiles and boats held by the purchaser or mortgagor in violation of the sale or mortgage contract.

He was charged in a one-count indictment under 18 U.S.C. §912 with having in his work impersonated an agent of the FBI, to which charge he pleaded not guilty,

was convicted in a jury trial and was sentenced by the Trial Court to three years imprisonment with execution of sentence suspended and probation for five years ordered.

The Trial Court under 18 U.S.C. §3231 had, and this Court under 28 U.S.C. §§1291 and 1294 has, jurisdiction.

On this appeal, appellant's assigned errors in effect are: (1) That the evidence was insufficient to sustain the verdict; (2) That the Trial Court erred in admitting evidence of prior similar acts which were remote, incompetent and prejudicial; (3) That the Trial Court erred in giving to the jury erroneous instructions prejudicial to appellant; and (4) That the Trial Court erroneously imposed improperly restrictive conditions of probation upon appellant.

As shown by the record and appellee's brief, to support the charges of the indictment, appellee, United States of America, introduced in substance and effect the following evidence: That on March 13, 1962 appellant came to the door of the residence of witness Reedy in San Diego and asked if Mr. Durbin lived there; that upon being told by Reedy that Mr. Durbin was not there, appellant stated he was "a special investigator"; that Reedy then asked what appellant wanted and whether appellant had come to the Reedy home concerning the automobile of Reedy's father-in-law, John Durbin; that appellant stated he had not come regarding repossession of the car, but asked Reedy if he knew where he could contact Mr. Durbin; that Reedy told appellant he did not know where Mr. Durbin was, but that if he did know he would not tell appellant. Mr. Reedy then left the door.

and his wife, Mrs. Reedy, then went to the door, and Mr. Reedy heard her tell the appellant to come in and that she would discuss the matter further, but would not guarantee that she would tell him anything; that the appellant then entered the Reedy home, and all three, the appellant and Mr. and Mrs. Reedy, sat in the front room. When appellant asked Mr. Reedy if he knew it was a federal crime to transport a car across a state line, Mr. Reedy replied that the seller knew that Durbin worked for the federal government; that appellant said that the seller from whom Durbin bought the car "had turned the matter over to us";

That, thereupon, Reedy asked appellant for his credentials; that appellant handed Reedy a leather folder in which he observed a gold badge, the details of which he did not remember; and a card of about 2-1/2" x 3-1/2" in which appellant's picture appeared in the lower left hand corner; that the card also had appellant's name, address, height and color of eyes typed in, and at the bottom of the card were the words "Federal Bureau of Investigation"; that the card appellant showed to Reedy on March 13, 1962 was not Exhibit 1, but was similar to it; that appellant asked Reedy if he and his wife knew they could get into trouble by withholding information; that while Reedy had in his hands the card shown him by appellant on March 13, 1962, Reedy told his wife that "the gentleman was from the FBI and that we might as well tell him, because regardless he was going to find out"; that in response to that statement, appellant said nothing; that Mrs. Reedy then took from her husband the folder presented by appellant, looked at it, returned it to appellant and then left the room and obtained a letter which had Mr. Durbin's post office box address on it which she then related to appellant; that when Reedy

requested his wife to obtain that information for appellant. Reedy believed appellant was an FBI agent, and Reedy would not have requested or allowed this information to be given to appellant had he not had that belief.

Mrs. Reedy testified that she heard her husband, Mr. Reedy, say appellant was an FBI agent; that she then went and found a letter from her father, Mr. Durbin, having his address on it and gave it to appellant, and that she would not have given appellant that information if she had not believed he was an FBI agent, although she said she did not read the card and did not observe on it the words "Federal Bureau of Investigation" but that she took her husband's word for that. Mrs. Reedy also corroborated much of her husband's testimony.

There was in evidence at the close of appellee's case in chief, and is now in evidence, Exhibit 6 which is a letter dated March 13, 1962, from appellant to the United States National Bank, Eugene, Oregon, reporting to the bank the information obtained by appellant from the Reedys and enclosing an invoice, in evidence as Exhibit 7, for a $15.00 charge by appellant's employer, Pacific Coast Claims Adjusters, against the bank. Also in evidence as Exhibit 8 is a paid $15.00 check bearing the Durbin account name and issued by that bank to and endorsed by said employer of appellant.

FBI agent Feldhaus testified that he talked with appellant on June 27, 1962 when appellant said that he could not remember seeing the Reedys on the previous March 13th and that he did not remember any case on John Durbin, but that on June 29, 1962, the day of his arrest, appellant said that his review of the file in the

meantime received from Los Angeles had refreshed his memory and that he was the one who had made the call on the Reedys on March 13, 1962. Further, witness Feldhaus said in effect that he discussed with appellant the kind of identification he carried.

Also in its case in chief, appellee on the limited question of appellant's intent introduced evidence of two prior transactions of appellant when he repossessed a boat and an automobile, and was said by witnesses to have impersonated law officers.

From the foregoing evidence which was before the Trial Court and jury at the close of and in support of appellee's case in chief, it readily appears that such evidence and reasonable inferences to be drawn therefrom were sufficient to sustain a verdict of guilty of the charge as to all its elements, and that without other evidence if both sides had then rested, appellee would have been entitled to have the case submitted to the jury as against appellant's challenge to the sufficiency of appellee's evidence. The Trial Court did not err in overruling appellant's challenge and in denying his motion to dismiss made upon the close of appellee's case in chief.

Thereupon, appellant proceeded with his defense, and himself took the witness stand, denied that he represented himself as from the FBI, testified that for four or five years he had been a private investigator or repossessor and that prior to that he had been a police officer in Los Angeles. Other defense witnesses testified as to the credentials normally carried by private investigators and repossessors and as to appellant's good character. Appellant did not testify nor does he now contend that he was an FBI agent. The evidence

does not show that he was. Instead, it does show he was a private investigator and repossessor. There was then competent evidence from which the jury could properly infer that appellant was not an FBI agent and find that he falsely represented himself to be one.

The evidence supports a finding of the jury that, by means of his FBI impersonation, appellant obtained from the Reedys information concerning the whereabouts of John Durbin, which was of value to him, since as further appears from the record, he was paid $9.00 for his services in the Durbin car repossession matter.

Appellant's further objection to the introduction of evidence of appellant's two prior similar law officer impersonations on the alleged grounds that such evidence was irrelevant, immaterial and remote was carefully considered and overruled by the Trial Court, and we think rightly so. Appellee had the burden of proving criminal intent, and evidence of similar acts occurring reasonably near in time and reflecting intent similar to that charged in this case was clearly relevant and material as throwing light upon and explaining the intent with which the appellant did the things charged against him in the indictment.

Furthermore, we think the Trial Court properly ruled that appellant's two prior acts of impersonation in question were not too remote in time (1) since the first one occurred on August 30, 1961, only about 6-1/2 months before the offense alleged in this case, when the evidence tended to show that appellant succeeded in repossessing a boat after falsely representing himself to be "from the Federal Bureau of Investigation" and "from the FBI", and (2) since the second prior similar

act occurred on January 11, 1962, only 2 months before the offense alleged in this case, when the evidence tended to show appellant repossessed a Thunderbird automobile after falsely representing himself as "National City Police".

We reject appellant's contention of error in the Trial Court's instruction to the jury on criminal intent as that instruction was a correct and clear expression of the law applicable to the subject of, and correctly explaining, criminal intent, and clearly distinguishing it from motive.

We disagree with appellant's contention that the Trial Court's probation condition prohibiting appellant from engaging in the repossession business is unreasonable and improper. The occupational activity prohibited in the probation condition is the one in which appellant was engaged when he committed the offens of which he stands convicted. The probation condition certainly related to the crime with which he was charged. Naturally probation is upon condition that a law violator not repeat his offense. A reasonable if not the best way to prevent recurrent similar offenses is to withdraw from appellant the privilege of engaging in the repossession business where the temptation to impersonate law officers is most likely to occur. The Trial Court committed no error respecting the probation conditions.

There can be no question in this case but that, both at the close of appellee's case in chief and at the close of all the evidence, there was substantial evidence to support a verdict of guilty; and in that connection the Government is entitled to have the Court take the view of the evidence most favorable to the Government. The

Supreme Court has held that

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (citing).

Glasser v. United States, 315 U.S. 60, 80, 86 L.ed 680, 704. Likewise, this Court has ruled

> "While there is some conflict in the testimony, we must view the evidence in the light most favorable to the Government, including the reasonable inferences to be drawn therefrom. If, viewed in this light, there is substantial evidence to support the jury's verdict, it must be sustained".

Bolen v. United States, 9 Cir., 1962, 303 F.2d 870, 874.

In this case, finding no error in the Trial Court's action, we Affirm.

(Endorsed) Opinion Filed Nov. 12, 1963.

Frank H. Schmid, Clerk.